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No. 43

In the Supreme Court of the United States

OCTOBER TERM, 1951

PETER HARISIADES, PETITIONER

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION AT THE PORT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 987-994) is reported at 187 F. 2d 137.

JURISDICTION

The judgment of the Court of Appeals was entered on February 6, 1951 (R. 995). The petition for a writ of certiorari was filed on May 3, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Congress has the power to determine that aliens who were formerly members of an organization advocating violent overthrow of the Government are undesirable residents who should be deported.

2. Whether the act requiring deportation is unconstitutional because of its alleged ex post facto or retrospective effect.

3. Whether the Administrative Procedure Act applied to petitioner's deportation proceedings where the warrant was served prior to the effective date of the act.

4. Whether petitioner was accorded procedural due process.

STATUTES INVOLVED

Act of October 16, 1918 (40 Stat. 1012), as amended by the act of June 5, 1920 (41 Stat. 1008), and the act of June 28, 1940 (54 Stat. 673):

> Sec. 1. That any alien who, at any time, shall be or shall have been a member of any one of the following classes shall be excluded from admission into the United States:
>
> * * * * * *
>
> (c) Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, * * *.

(d) Aliens who write * * * any written or printed matter * * * advising, advocating or teaching: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, * * *

(e) Aliens who are members of or affiliated with any organization, association, society, or group, that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, * * * written or printed matter of the character described in subdivision (d). * * *

Sec. 2. Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in section 1 of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported * * *.

Administrative Procedure Act, sec. 12 (60 Stat. 237, 244):

* * * no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

STATEMENT

Petitioner, a Greek national, came to this country in 1916 at the age of 13 (R. 104-105). Admittedly he joined the Communist Party in 1925[1]

[1] It was then called the Workers Party. The name was changed to Communist Party of the United States of America in 1939, while petitioner was a member (R. 27-28).

and continued as an active member until the latter part of 1939, when the Party dropped all aliens from membership (R. 28, 46). He rose from a rank and file member to Branch Executive Committeeman (R. 29), organizer of the Communist Party (R. 29-30), Secretary of the Greek Bureau of the Communist Party, and editor of its paper, "Empros" (R. 30-31). Since 1939 he has not been officially connected with the Party but he has associated with some of its members (R. 46-47). He testified that he still believes in its philosophy and principles (R. 46-47).

A deportation warrant for petitioner's arrest under the act of October 16, 1918, as amended by the act of June 5, 1920, was issued on April 12, 1930, charging him with being a member of or affiliated with an organization that advocates the overthrow of the government by force and violence (R. 120).[2] The Immigration Service was unable to locate petitioner and the warrant was not served until May 2, 1946 (R. 16-18, 126).

Deportation hearings were held on October 15, 1946 (R. 13-52), and January 30-31, 1947 (R. 53-119). Immigration inspector Zimmerman, with the consent of petitioner (R. 200), acted in the dual capacity of presiding and examining inspector (R. 13). This conformed with the regulations then in force (8 C.F.R. 150.6(b), (n)).

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[2] The allegation was based on admissions which petitioner made to the New Bedford, Massachusetts police (R. 122-123).

At the first hearing, supplemental charges were filed specifying that petitioner had after entry (a) believed in or advocated the overthrow of the government by force and violence, (b) been a member of an organization that believes in or advocates such overthrow, (c) been affiliated with such an organization.[3]

The inspector, on March 11, 1947, found that these added charges had been sustained, but that the original one (of being then a member of a subversive organization) had not. He recommended that petitioner be deported (R. 126-194).

On August 5, 1947, the Commissioner ordered the case reopened in order to authenticate certain documents, receive additional evidence, and file additional charges (R. 197). At the reopened hearings, held in February and March 1948 (R. 204), petitioner was further charged with having been, after entry, a member of and affiliated with an organization that advocates the overthrow of the government by force and violence and distributes printed matter so advocating (R. 210-211). At petitioner's request, inspector Zimmerman continued to act as presiding inspector (R. 198-203). Inspector Roberts acted as examining inspector (R. 204, 344).

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[3] *Kessler* v. *Strecker*, 307 U.S. 22 (1939), had held that the then statute authorized deportation only where the alien was a member of the organization at the time of service of the warrant. Past membership and conduct were made grounds for deportation by the amendment of June 28, 1940, 54 Stat. 673.

At the conclusion of these hearings, inspector Zimmerman, in an exhaustive opinion (R. 528-805), found on the basis of the evidence introduced at the hearings, that the Communist Party, in the years from 1925 to 1939, was an organization which advocated the violent overthrow of the government and distributed printed matter so advocating. Accordingly, he found that all the charges, except the original charge of present membership had been sustained. On review of the record, the Chief Examiner and Assistant Commissioner upheld these recommendations and ordered deportation (R. 807-855). On appeal, the Board of Immigration Appeals sustained the deportation order on the two grounds that petitioner had been a member, after entry, of an organization (a) which advocates the overthrow of the government by force and violence, and (b) which distributes printed matter so advocating (R. 868-873). It found "that the evidence of record does not establish that the respondent personally believed in or advocated the overthrow of the Government of the United States by force or violence," and that "since the respondent has admitted membership in the Communist Party of the United States, we believe that the grounds of deportation based on affiliation are, at the very best, superfluous" (R. 873).

Petitioner, when taken into custody, sued out a writ of habeas corpus in the United States Dis-

trict Court for the Southern District of New York. The writ was dismissed on February 20, 1950 (R. 935), after an exhaustive consideration of the record and issues (R. 875-935; 90 F. Supp. 397-431).

On that same day, this Court handed down its decision in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, whereupon petitioner moved to amend his petition to allege that the administrative proceedings were not conducted in accordance with the Administrative Procedure Act. The motion was denied, the court holding that the Administrative Procedure Act was inapplicable to these proceedings because they were initiated prior to its enactment (R. 966-979; 90 F. Supp. 431).

On a consolidated appeal from the orders dismissing the writ and denying the motion to amend, the Court of Appeals upheld the order of deportation on the merits, but, pursuant to section 23 of the Internal Security Act of 1950, enacted after the District Court's orders, reversed the judgment on the writ and remanded the cause with directions to hold it in abeyance pending (1) petitioner's being afforded the opportunity to choose the country to which he is to be deported and (2) the Attorney General's making a finding that he will not be subjected to physical persecution in the country to which he is sent (R. 993-994).

ARGUMENT

1. The basic question in this case is whether Congress has the power to terminate the residence in this country of aliens who formerly belonged to an organization which advocates the overthrow of the Government by force and violence. Petitioner's attacks on the constitutionality of that power are all predicated on the assumption that deportation is a personal punishment for improper conduct, subject to all the limitations on personal punishment enjoined by the Bill of Rights.

Basically, however, deportation is not punishment of the individual. Deportation is the exercise of sovereign power to protect the welfare of the nation by terminating the residence of aliens who are, in the legislative judgment, undesirable or a danger to the nation, whether or not that danger arises from the personal fault of the individual. The personal hardship which may result to the individual is the incidental result, and not the primary purpose, of the legislative judgment that particular classes of aliens are not desirable residents of this country. *Mahler* v. *Eby*, 264 U.S. 32, 38-39;[4] *Bugajewitz* v. *Adams*, 228

[4] "The theory of the draftsman of the petition for the writ and of the assignment of errors was that the same constitutional restrictions apply to an alien deportation act as to a law punishing crime. It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment. * * * [Congress] was, in the exercise of its unquestioned right, only seeking to rid the country of persons who had shown by their career that their continued presence here would not make for the safety or welfare of society."

U.S. 585, 591;[5] *Fong Yue Ting* v. *United States*, 149 U.S. 698, 709,[6] 730. Cf. *American Communications Association* v. *Douds*, 339 U.S. 382, 413-414; *Wong Wing* v. *United States*, 163 U.S. 228, 237.

Before the birth of this country, it was an accepted principle of international law that there is inherent in sovereignty the plenary right and power to exclude aliens or to deport them. See *Fong Yue Ting* v. *United States*, 149 U.S. 698; *The Chinese Exclusion Case (Chae Chan Ping* v. *United States)*, 130 U.S. 581, 606-609. In permitting an alien to enter the country, the Government merely accords him a revocable privilege or license to reside here. Regardless of the length of his residence or the propriety of his conduct while residing here, neither the Fifth Amendment nor any other provision of the Constitution confers on an alien a vested right to remain in the country. See *Mahler* v. *Eby*, 264 U.S. 32; *Ng Fung Ho* v. *White*, 259 U.S. 276, 280; *Bugajewitz* v. *Adams*, 228 U.S. 585, 591; *Tiaco* v. *Forbes*, 228 U.S. 549; *Turner* v. *Williams*, 194 U.S. 279; *Wong Wing* v. *United States*, 163 U.S. 228, 237; *Lem Moon Sing* v. *United States*, 158 U.S. 538, 547-549; *Fong Yue Ting* v.

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[5] "* * * nor is the deportation a punishment; it is simply a refusal by the Government to harbor persons whom it does not want."

[6] "'Deportation' is the removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated * * *."

United States, 149 U.S. 698; *Nishimura Ekiu* v. *United States*, 142 U.S. 651; *The Chinese Exclusion Cases*, *supra*. The act of deportation, therefore, does not in itself abridge a personal right guaranteed by the Constitution.[7]

Since the decision to deport involves a legislative judgment on a matter affecting the public welfare, and not the curtailment of vested constitutional rights of the individual, it would seem that the standard governing the power of Congress is that its judgment rest on a rational basis. See *United Public Workers* v. *Mitchell*, 330 U.S. 75; cf. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 154; *Carolene Products Co.* v. *United States*, 323 U.S. 18, 31.

Clearly there is a rational basis for this legislative judgment that membership, even past membership, in an organization which advocates the overthrow of the Government by force and violence renders an alien an undesirable resident of this country, whether or not the alien himself personally advocated such overthrow. Such an organization—in this case the Communist Party—is obviously a danger to the welfare and safety of the country. *Dennis* v. *United States*, No. 336, O.T.

[7] The individual alien does have a personal right with respect to the manner in which the Government exercises its judgment to deport. Since, while resident in this country, he is accorded the protection of the Constitution, the procedure adopted by the Government against the alien present in this country to carry out the decision to terminate his residence must accord with procedural due process. *Fong Yue Ting* v. *United States*, 149 U.S. 698, 709.

1950, decided June 4, 1951; *American Communications Association* v. *Douds*, 339 U.S. 382, 391.[8] The degree of danger is directly related to the size of its membership, even if some members are not consciously aware of the full implications of the program. That is particularly true in the case of a disciplined organization like the Communist Party, whose members are trained to follow orders. For example, the man who strikes pursuant to orders of a superior can be a danger to the country, even if he personally thinks the strike is legitimate and is unaware that the strike is called for a political purpose. Cf. *American Communications Association* v. *Douds*, *supra*. Similarly a man can obey orders which he does not understand and in that manner commit espionage and sabotage. Indeed, petitioner himself, though as-

[8] Petitioner's attack on the administrative finding that the Communist Party advocates the violent overthrow of the government (Pet. 25) is clearly without merit. The evidence at the hearing was ample to sustain the findings (see the opinion of the Court of Appeals, R. 991-992). It should be noted in this connection that Section 22 of the Internal Security Act of 1950 (Public Law 831, 81st Cong., 2d sess.) provides for the deportation of "Any alien who was at the time of entering the United States, or has been at any time thereafter," a member of or affiliated with "(i) the Communist Party of the United States, * * * (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt; * * *."

serting that the Communist Party had not taught the forcible overthrow of the Government, refused to deny that "If directed by your Communist Party superiors during the period of your membership to take an active part in the overthrow of the existing United States government by force, would you be ready to do so?" (R. 46.) Lacking the necessary intent, he may not be guilty of the crime, but he is nonetheless a danger to the country and an undesirable resident.

Congress could also rationally decide that past membership in an organization which advocates the overthrow of the Government by violence carries with it the seeds of danger. Withdrawal from membership does not necessarily mean a change of heart. In this very case, petitioner does not claim to have reformed; he asserts that he still has "the same ideas" he had when he was an active member of the Communist Party (R. 47). He did not leave the party voluntarily, but was expelled as the result of a party policy to drop all aliens (R. 46).[9] Congress could rationally take into con-

[9] This policy was adopted in the latter part of 1939 (R. 28) shortly after it became clear that Congress was about to amend the statute so as to make past membership in a proscribed organization ground for deportation, and thereby to overturn the result reached in *Kessler* v. *Strecker*, 307 U.S. 22, decided in April 1939. See H. Rep. 994, 76th Cong., 1st sess., p. 6, June 29, 1939; and S. Rep. 1154, 76th Cong., 1st sess., p. 5, August 5, 1939. A statement of the National Committee of the Communist Party published in the *Daily Worker* of August 24, 1940, and reprinted in *The Communist*, May 1941, pp. 468-469, states that:

"* * * The National Committee took action cancelling

sideration the fact that voluntary withdrawal from membership may often be a mere subterfuge, not affecting fundamental adherence to subversive principles. And even further, Congress could rationally decide that an alien, who has once shown himself to be so unattached to this country and so open to outside influences as to be willing to join a subversive organization, is a potentially dangerous type of person to whom this country should not extend its hospitality. See *Turner* v. *Williams*, 194 U.S. 279, 294. The United States is not, under our Constitution, bound to keep forever all such aliens who enter upon its shores.

The constitutional arguments advanced by petitioner, based on the First and Fifth Amendments, are unavailing. Constitutional rights, even First Amendment rights, are not absolute. *Dennis* v. *United States*, O.T. 1950, No. 336, decided June 4, 1951; *American Communications Association* v. *Douds*, 339 U.S. 382. The question is essentially one of balance; the public interest to be served, the rational connection between the statute and its objects, and the extent of abridgement of First Amendment rights are all factors to be considered. *Ibid.* Here the public interest to be served is an important one, the welfare and safety of this coun-

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the Party membership of all non-citizens without exception, because of the rising tide of exceptional laws directed against them, for which there is no present protection." The Party Constitution was amended in November of 1940 so as to make only citizens eligible for membership. *The Communist*, December 1940, p. 1087.

try. As we have shown, there is clearly a rational relationship between national safety and the removal of aliens, who, owing no fundamental allegiance to the United States, have voluntarily joined an organization hostile to the Government. The abridgement of rights is limited. The primary curtailment is of the privilege to remain here, and that is not a right which the Constitution confers on an alien. Furthermore, advocacy of the overthrow of the Government by force and violence is not a right protected by the First Amendment. *Dennis* v. *United States, supra.*

In this case, there is a finding that there was no evidence that petitioner himself personally advocated the overthrow of the Government by force and violence (R. 873). The evidence, however, is clear that petitioner voluntarily joined and remained in the party for a long period of years and rose to a position of prominence in the party. There is no finding that he did not know of the party's aims, and in the face of his prominence, such a finding could not have been made.

The issue here relates to the power of Congress to rely for purposes of deportability upon the fact that an alien joined such an organization without regard for proof that he personally adopted its subversive aims. The statute applies to his conduct, not his words or his advocacy. It does not criminally punish him for that conduct; it merely withdraws from him a revocable license to remain

here. That is not the type of curtailment of First or Fifth Amendment rights which would justify overruling the judgment of Congress in a matter affecting the welfare and safety of the state.

This Court said, with respect to the statute barring Communists from union office involved in the *Douds* case (p. 403):

> * * * There are here involved none of the elements of censorship or prohibition of the dissemination of information that were present in the cases mainly relied upon by those attacking the statute. The "discouragements" of § 9(h) proceed, not against the groups or beliefs identified therein, but only against the combination of those affiliations or beliefs with occupancy of a position of great power over the economy of the country. Congress has concluded that substantial harm, in the form of direct, positive action, may be expected from that combination. In this legislation, Congress did not restrain the activities of the Communist Party as a political organization; nor did it attempt to stifle beliefs. Compare *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943).

Here, too, there is no element of censorship or prohibition on dissemination of information. The discouragements proceed against the combination of membership and the special status of being an alien, i.e., without owing full allegiance to the country. It leaves those persons who are affected free to maintain their affiliations and beliefs sub-

ject only to the condition that they do so in the country to which they owe or choose to give allegiance, and not in the country whose hospitality they have abused.

We submit that the interest of this country in terminating the residence of aliens, who by their conduct have shown that they are potentially dangerous to the welfare and safety of the country, overbalances this limited infringement on such personal rights as an alien temporarily resident here may have under the Constitution. Judged in the light of the Bill of Rights, the statute here involved is constitutional.

2. As to petitioner's contention that the 1940 amendment, under which he was ordered deported for having been a member of the Communist Party from 1924 to 1939, denied him due process of law in that "it subjects him to punishment under a law having an *ex post facto* and retrospective effect" (Pet. 37-38), the short answer is that the statute is based on a rational finding that petitioner is presently an undesirable alien. Past conduct is used merely as a means of defining the class of aliens whom Congress has concluded are presently undesirable. Furthermore, membership in an organization advocating the violent overthrow of the Government was a ground for deportation in all the years from 1925 to 1939 that petitioner was admittedly a member of the Communist Party.

Petitioner is not being deported for conduct not previously defined as a basis for deportation.

As stated in *Eichenlaub* v. *Shaughnessy*, 338 U. S. 521, 529, "There is no question as to the power of Congress to enact a statute to deport aliens because of past misconduct." In *Mahler* v. *Eby*, 264 U.S. 32, cited in the *Eichenlaub* case, the aliens had been convicted in 1918 of violations of the Selective Service Act of May 18, 1917 (c. 15, 40 Stat. 76). They were later ordered deported under authority of the subsequently enacted Act of May 10, 1920 (c. 174, 41 Stat. 593), which provided for the deportation of aliens who had been convicted under various statutes, including the Selective Service and Espionage Acts, if the Secretary of Labor, after hearing, should find the aliens to be undesirable residents. To the argument that this increased the punishment for the previously committed criminal act, thereby rendering the act of 1920 an *ex post facto* law, this Court replied (264 U.S. at 39):

> * * * It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment. * * * Congress by the Act of 1920 was not increasing the punishment for the crimes of which petitioners had been convicted, by requiring their deportation if found undesirable residents. It was, in the exercise of its unquestioned right, only seeking to rid the country of persons who had

shown by their career that their continued presence here would not make for the safety or welfare of society.[10]

Petitioner contends that the statute there did not apply retrospectively for it required a finding of present undesirability (Pet. 37). But, in order to find present undesirability, the alien must have been convicted of a crime[11] and his conviction alone was enough to justify finding him undesirable.[12] It is equally true that Congress, by the instant statute, has found that aliens who were once members of an organization advocating violent overthrow of the Government are presently undesirable residents. The statute does not apply retrospectively.

3. Petitioner contends that the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1001) applied to his deportation procedings (Pet. 39-45) and that, since the provisions of that Act (sections 5, 7, 8 and 11) for separation of presiding and examining

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[10] Petitioner contends that this language is only dicta (Pet. 37). The decision is, we submit, a direct holding on the point for had the Court there accepted the aliens' contention, they would have been entitled to discharge from custody. The case, however, was remanded for other reasons so that the *ex post facto* principal was held inapplicable.

[11] 264 U.S. at 39: "It was their past conviction that put them in the class of persons liable to be deported as undesirable citizens."

[12] 264 U.S. at 42: "But it is said there was no evidence in the hearings of any of them as to their being undesirable residents of the United States. There were their convictions. Those were enough to justify the Secretary in finding that they were undesirable. The statute does not expressly require additional evidence."

functions, and those specifying the method of appointment, and qualifications, of the presiding and examining inspectors were not followed, his hearing was invalid. Section 12 of the act provides that—

> * * * no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

The question is, therefore, when petitioner's deportation proceedings were initiated.[13]

The act became effective September 11, 1946 (60 Stat. 237, 244). A warrant of arrest, charging petitioner with illegal residence in the country on the ground of being a member of an organization advocating violent overthrow of the Government, was issued in 1930. The warrant was not served until May 2, 1946. The proceedings were initiated prior to the effective date of the Administrative Procedure Act (September 11, 1946), if the issuance of the warrant or its service initiated them. At the time the warrant was issued only present membership was ground for deportation, but in 1940 past membership was added (Act of June 28, 1940, 54 Stat. 670, 673). Petitioner was a member of the Communist Party from 1925 until

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[13] As the Court of Appeals said, the legislative history shows that "no provision of the Act was to apply to any proceeding commenced before the Act became effective." This history is summarized in note 2 of the opinion of the Court of Appeals. (R. 989.)

1939. Additional charges based on past membership were lodged against petitioner, in accordance with the regulations (8 C.F.R. 150.6(1)), at the October 1946 hearings and the reopened 1948 hearings. The new charges were proved, but the original charge was not, although it was a true charge at the time the warrant was issued. Petitioner contends that the charges lodged against him in October 1946 and the reopened hearings each initiated new proceedings. We submit that the District Court and the Court of Appeals correctly held that they did not.

The transaction described in the warrant of arrest, which contains the charge and serves the purpose of a complaint, was the same as that in the later lodged charges except for the time of its occurrence. The new charges were lodged to conform to the language of the 1940 amendment. In a civil action, where a new claim made in an amended complaint "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." Rule 15(c), Federal Rules of Civil Procedure. Thus, an amended complaint, based substantially on the original transaction, though asserting a claim under a different statute, relates back to the commencement of the original action, so that the new claim is not barred by limitations. *N.Y. Cent. R.R.* v. *Kinney*, 260 U.S. 340. Under statutes

authorizing deportation within a specified number of years after entry, the proceedings are held to commence at either the time the warrant was issued or served. *Raftery* v. *Tillinghast*, 63 F. 2d 97, 99 (C.A. 1); *Tillinghast* v. *Cresswell*, 54 F. 2d 459, 460 (C.A. 1), certiorari denied, 286 U.S. 560; *United States* v. *Day*, 20 F. 2d 733, 735-736 (C.A. 2). See *United States* v. *Carusi*, 166 F. 2d 457, 459, n. 5 (C.A. 3). Cf. *Kessler* v. *Strecker*, 307 U.S. 22, 29.

Petitioner argues that the new charges cannot relate back to the warrant of arrest because, under the facts proven, there was a period of time, from 1939 until the 1940 amendment was enacted, that he was not deportable on any grounds (Pet. 39-40). He does not, however, maintain that the warrant of arrest was invalid. The ground for deportation set forth in the warrant was a valid one at all times; the fact that the Government subsequently failed to prove that ground did not affect the validity of the warrant when issued or served. The subsequently lodged charges, arising out of the transaction set forth therein, related back to the commencement of the proceedings under the warrant.

In any event, the procedure followed conforms to the present law. Public Law 843, 81st Cong., 2d sess., enacted September 27, 1950, provides—

> Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of sections 5, 7, and 8 of the Administrative Procedure Act.

Any new hearings could be conducted in the same manner as the prior ones.[14] The problem therefore is one that will not recur in the future.

4. Petitioner also argues that he was not accorded procedural due process (Pet. 39, 40), apparently on the ground that, in the 1946-1947 hearings, the same inspector performed both presiding and examining functions. The validity of a deportation hearing before one inspector has been sustained. *United States ex rel. Di Tomasso* v. *Martineau*, 97 F. 2d 503, 504 (C.A. 2); *United States ex rel. Ciccerelli* v. *Curran*, 12 F. 2d 394, 396 (C.A. 2). Procedural due process in a deportation hearing requires only due notice and ample opportunity to be heard before an immigration inspector (see *Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 106; *Tisi* v. *Tod*, 264 U.S. 131; *Ng Fung Ho* v. *White*, *supra*, 259 U.S. 276, 284; *The Japanese Immigrant Case*, 189 U.S.

[14] *Yanish* v. *Barber*, 181 F. 2d 492 (C.A. 9), decided April 24, 1950, is not in conflict with the decision below, as petitioner contends (Pet. 43-44). That case, a per curiam decision, merely held that certain regulations were "applicable to proceedings inaugurated prior as well as subsequent to effective date of the Administrative Procedure Act." The regulations referred to were promulgated on March 9, 1950 (15 Fed. Reg. 1298-1302), after the decision in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33. On July 31, 1950, following the *Yanish* decision, these regulations were amended to exclude therefrom proceedings conducted prior to March 10, 1950, where the warrant of arrest was served prior to September 11, 1946 (15 Fed. Reg. 5042).

The warrant of arrest was served on petitioner on May 2, 1946. His hearings were concluded, and he was ordered deported, in 1948. The order was affirmed by the Board of Immigration Appeals on May 13, 1949. So the regulations referred to in the *Yanish* case were not in effect at the time

86; *Fong Yue Ting* v. *United States, supra,* 149 U.S. 698; or "no error so flagrant as to convince a court of the essential unfairness of the trial" (273 U.S. at 106).[15]

We do not understand petitioner to contend that he did not receive a fair hearing, as, indeed, the record shows he could not.[16] He consented to inspector Zimmerman acting "both as presiding and examining inspector" in the 1946-1947 hearings and requested that he act as presiding inspector in the reopened 1948 hearings (R. 200).[17] In making this request, he indicated that, despite Zimmerman's recommendation that he be deported, he had received a fair hearing when Zimmerman acted in both capacities and that he thought Zimmerman would accord him a more favorable hearing than any other inspector. His attorney said (R. 200)—

> * * * despite the adverse memorandum of Inspector Zimmerman who conducted the original hearing, such inspector was ready and willing to listen to the testimony and to give the respondent an opportunity to meet such testimony; * * * the differences between the inspector and the respondent presented an issuable question which the Cen-

petitioner's proceedings were conducted, nor do those regulations now apply to his case (15 Fed. Reg. 7639).

[15] We do not think the dictum in the *Wong Yang Sung* case (339 U.S. at 50), referred to by petitioner (Pet. 41), was intended to assert that the procedure followed in deportation cases for many years was unconstitutional.

[16] The hearings were conducted in accordance with the effective regulations (8 C.F.R. 150.6(b), (n)).

[17] Zimmerman did not act as the examining inspector in the reopened hearings (R. 204).

tral Office and thereafter the Board of Immigration Appeals were called upon to determine upon the basis of a memorandum adverse to the respondent but nevertheless presenting and meeting his views.

Respondent believes that the present change in the personnel is due to the fact that the original inspector [Zimmerman] in his case, whom he consented to have act both as presiding and examining inspector, was not sufficiently prejudiced against the respondent to meet the present prevailing views of the Department of Justice and for that reason has been removed from this case.

CONCLUSION

Since the decision below is in accord with principles laid down by this Court in a long series of cases over many years, we believe that denial of the petition for certiorari is warranted. It may be, however, that, at the time this Court will act on the petition, the same constitutional issues with respect to the applicability of the 1940 statute to analogous facts will be before this Court on direct appeals from the decision of a statutory three-judge court in two consolidated cases in the District of Columbia. *Coleman* v. *McGrath*, Civil No. 5141-50; *Mascitti* v. *McGrath*, Civil No. 5148-50. Applications for temporary injunctions against enforcement of deportation orders in those cases, based on the same constitutional arguments advanced by this petitioner, were denied by the statutory court on March 20, 1951. The moving

parties noted appeals to this Court in order to protect their rights, but have not docketed the appeals because of the expectation that final judgments would be entered. It is anticipated that orders denying permanent injunctions may be entered in June and appeals taken therefrom.

If such appeals should be before this Court, and if this Court should feel that the issues raised thereby are substantial enough to require argument in the light of the considerations presented in this brief, then this petition should likewise be granted as to the constitutional questions raised in all three cases. We submit, however, that in such event, the grant of certiorari should be limited to the first two questions as stated at p. 2 *supra*,[18] which would be involved in all three cases, and that for the reasons herein set forth certiorari should be denied as to the remaining points, raised by petitioner alone, attacking the validity of the administrative procedure.

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[18] These questions correspond to "the first question presented" in the petition for certiorari, p. 4.

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